

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MICHAEL S.,

VOLUME 10, NUMBER 1

V.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C20-6099 TLF

## ORDER REVERSING AND REMANDING FOR AWARD OF BENEFITS

Plaintiff has brought this matter for judicial review of the Commissioner's denial of his application for disability insurance benefits and supplemental security income benefits.

The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13.

## I. ISSUES FOR REVIEW

1. Should the Court remand for further proceedings, or for an award of benefits?

## II. BACKGROUND

On March 5, 2018, plaintiff filed a Title II application for a period of disability and disability insurance benefits, alleging a disability onset date of August 1, 2014. Administrative Record (“AR”) 15. On January 30, 2018, plaintiff filed a Title XVI application for supplemental security income alleging a disability onset date of August 1,

1 2014. AR 15. Both applications were denied initially and upon reconsideration. *Id.* A  
2 telephonic hearing was held before Administrative Law Judge (“ALJ”) M.J. Adams on  
3 June 23, 2020. AR 15, 32-62. On July 9, 2020, the ALJ issued a decision finding that  
4 plaintiff was not disabled. AR 15-25. On September 17, 2020 the Appeals Council  
5 denied review making the ALJ’s decision the final agency decision. AR 1-6.

6 Plaintiff seeks judicial review of the ALJ’s July 9, 2020 decision. Dkt. 4.

7 III. STANDARD OF REVIEW

8 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s  
9 denial of Social Security benefits if the ALJ’s findings are based on legal error or not  
10 supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874  
11 F.3d 648, 654 (9th Cir. 2017). Substantial evidence is “such relevant evidence as a  
12 reasonable mind might accept as adequate to support a conclusion.” *Biestek v.*  
13 *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted).

14 IV. DISCUSSION

15 The ALJ found that plaintiff had the severe, medically determinable impairments  
16 of hypertension, status-post left upper extremity laceration; depression; anxiety; drug  
17 and alcohol abuse; and post-traumatic stress disorder. AR 18. Based on the limitations  
18 stemming from these impairments, the ALJ found that plaintiff could perform medium  
19 work with the following limitations:

20 [plaintiff] can never climb ladders, ropes, or scaffolds, occasionally reach  
21 overhead with the left upper extremity; and frequently crawl, crouch, kneel,  
22 stoop, balance, and climb ramps or stairs. He should avoid concentrated  
23 exposure to extreme cold, extreme heat, noise, vibration, respiratory  
24 irritants, and hazards. The [plaintiff] can understand, remember, and carry  
25 out simple instructions; exercise simple workplace judgment; and perform  
work that is learned on the job in less than 30 days by short demonstration  
and practice or repetition. He can respond appropriately to supervision;

1 can have superficial interactions with coworkers, but should not be  
2 required to work in close coordination with coworkers where teamwork is  
3 required; and can work in jobs that require only casual or superficial  
4 interactions or contact with the general public. He can deal with occasional  
5 changes in the workplace.

6 AR 19-20. Relying on vocational expert (“VE”) testimony, the ALJ determined at step  
7 five of the sequential evaluation that plaintiff was not disabled. AR 23-24.

8 Plaintiff argues that the ALJ erred in finding that plaintiff had marked limitations in  
9 his ability to maintain concentration, persistence, or pace, yet failing to set forth these  
10 limitations in the RFC determination. Dkt. 10 at 1. Plaintiff also contends that the ALJ  
11 erred in rejecting the opinions of an examining psychiatrist, consultative examining  
12 psychologist, and state contracted reviewing psychologist. *Id.* Finally, plaintiff assigns  
13 error to the ALJ’s rejection of plaintiff’s testimony. *Id.* at 2.

14 The Commissioner concedes that the ALJ erred in evaluating plaintiff’s mental  
15 residual functional capacity. Dkt. 14 at 2. The Commissioner states that the ALJ erred  
16 by finding that plaintiff had marked limitations in concentration, persistence and pace,  
17 but failing to reflect these levels of limitations in the residual functional capacity  
18 determination. *Id.* at 2-3. Additionally, the Commissioner explains that the ALJ’s RFC  
19 finding is inconsistent with marked limitations and is even inconsistent with moderate  
20 limitations in concentration, persistence and pace. *Id.* at 3.

21 The Commissioner argues that the Court should reverse and remand this action  
22 for further administrative proceedings because plaintiff’s residual functional capacity is  
23 unclear due to inconsistencies in the record. Dkt. 14 at 3-5. Plaintiff argues the Court  
24 should remand this action for an award of benefits. Dkt. 16.

1       A. Medical Opinions

2       Under current Ninth Circuit precedent, an ALJ must provide “clear and  
3 convincing” reasons to reject the uncontradicted opinions of an examining doctor, and  
4 “specific and legitimate” reasons to reject the contradicted opinions of an examining  
5 doctor. See *Lester v. Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995).

6       The Social Security Administration changed the regulations applicable to  
7 evaluation of medical opinions; hierarchy among medical opinions has been eliminated,  
8 but ALJs are required to explain their reasoning and specifically address how they  
9 considered the supportability and consistency of each opinion. See 20 C.F.R. §  
10 416.920c; Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed.  
11 Reg. 5844-01 (Jan. 18, 2017).

12       These are the two most important factors in the ALJ’s evaluation of medical  
13 opinions or findings; therefore, “[t]he ‘more relevant the objective medical evidence and  
14 supporting explanations presented’ and the ‘more consistent’ with evidence from other  
15 sources, the more persuasive a medical opinion or prior finding.” *Linda F. v. Saul*, No.  
16 C20-5076-MAT, 2020 WL 6544628, at \*2 (quoting 20 C.F.R. § 404.1520c(c)(1)-(2)).

17       The ALJ’s reasoning must be supported by substantial evidence and free from  
18 legal error. *Ford v. Saul*, 950 F.3d 1141, 1153-56 (9th Cir. 2020) (citing *Tommasetti v.*  
19 *Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008)); see also *Murray v. Heckler*, 722 F.2d 499,  
20 501–02 (9th Cir. 1983).

21           1. Dan Neims, Psy.D – 2015 Evaluation

22       Dr. Neims conducted a psychological evaluation and completed a  
23 Psychological/Psychiatric Evaluation form in August of 2015. AR 444. Dr. Neims

1 diagnosed plaintiff with PTSD, chronic (R/O dissociative features); GAD; MDE  
2 Recurrent Severe; R/O atypical Bipolar II; R/O psychiatric manifestation of seizure  
3 disorder; and Polysubstance Dependence in reported remission. AR 445.

4 Dr. Neims opined that plaintiff's conditions would have a mild effect on plaintiff's  
5 ability to understand, remember, and persist in task following both simple and detailed  
6 instructions and learn new tasks. AR 446. Dr. Neims further opined moderate  
7 impairment in plaintiff's ability to perform activities within a schedule, maintain regular  
8 attendance and be punctual within customary tolerance without special supervision;  
9 adapt to changes in a routine work setting; make simple work-related decisions; be  
10 aware of normal hazards and take appropriate precautions; and set realistic goals and  
11 plan independently<sup>1</sup>. AR 446.

12 Next, Dr. Neims opined that plaintiff's conditions created a marked impairment in  
13 plaintiff's ability to ask simple questions or request assistance; communicate and  
14 perform effectively in a work setting; complete a normal work day and work week  
15 without interruptions from psychologically based symptoms; and maintain appropriate  
16 behavior in a work setting. AR 446. Finally, Dr. Neims confirmed plaintiff's impairments  
17 were not the result of alcohol or drug use within the past 60 days. AR 446.

18 The ALJ discredited Dr. Neims' opinion because "it appears more restrictive than  
19 the underlying mental status exam on which it is based." AR 22. A conflict between  
20 treatment notes and a physician's opinion may be sufficient reason to discredit the  
21 opinion of the physician. *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014).

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23 <sup>1</sup> Dr. Nimes also stated that plaintiff was both mildly and moderately limited in his ability to perform routine  
24 tasks without special supervision. AR 446.  
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1 However, substantial evidence does not support the ALJ's determination that Dr. Neims  
2 opinion is inconsistent with the underlying mental status exam.

3 First, it is unclear what portion of the mental status exam the ALJ finds  
4 inconsistent with Dr. Neims opinion, because the ALJ's decision does not refer to any  
5 particular allegedly inconsistent portion of the exam. AR 22.

6 The record shows the mental status exam is consistent with Dr. Neims' opinion.  
7 Dr. Neims found that plaintiff suffered from PTSD mood disruption and anxiety. AR 445.  
8 The mental status exam noted that plaintiff had an anxious, depressed and irritable  
9 mood as well as an anxious tangential thought process. AR 447. These notations  
10 appear to be consistent with Dr. Neims' diagnosis. Additionally, the examination findings  
11 that plaintiff had an intact fund of knowledge, and intact abstract thought process, with  
12 fair to borderline concentration, do not contradict Dr. Neims' opinion. AR 447.

13 Additionally, even if the mental status exam did contradict Dr. Neims' opinion, the  
14 exam must be considered in the context of the overall diagnostic record. *Ghanim*, 763  
15 F.3d at 1162; *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995) ("Occasional symptom-  
16 free periods ... are not inconsistent with disability). Dr. Neims did not form his opinion  
17 based solely on the mental status exam, rather Dr. Neims reviewed plaintiff's medical  
18 records and medical history in diagnosing plaintiff's mental health conditions. AR 444-  
19 45. Accordingly, even if plaintiff was not exhibiting symptoms on the date of the mental  
20 status exam, this does not mean that Dr. Neims' findings – based on plaintiff's medical  
21 history – were unsupported. *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001)  
22 ("That a person who suffers from severe panic attacks, anxiety, and depression makes

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1 some improvements does not mean that the person's impairments no longer seriously  
2 affect her ability to function in a workplace.").

3 The ALJ's rejection of Dr. Neims' opinion is unsupported by substantial evidence.

4 2. Bruce Tapper Ph.D.

5 On December 28, 2018 Dr. Tapper conducted a consultative psychological  
6 evaluation of the claimant and provided a Psychological Diagnostic Evaluation. AR 708-  
7 712. Dr. Tapper noted that plaintiff exhibited a depressed and anxious mood, a tense  
8 affect consistent with anxiety, reported mood cycling, continued depression and  
9 symptoms of PTSD. AR 710. Dr. Tapper also stated that plaintiff reported that he was  
10 socially avoidant to the point of agoraphobia and often did not want to leave his house.  
11 AR 710. Further. Dr. Tapper noted that plaintiff experienced daily panic attacks. AR 710.

12 Additionally, Dr. Tapper stated that plaintiff suffered from paranoid thought  
13 content as well as auditory and visual hallucinations. AR 710-11. Dr. Tapper noted that  
14 plaintiff's fund of knowledge was within average limits, but plaintiff's concentration and  
15 abstraction abilities were impaired. AR 711. Dr. Tapper diagnosed plaintiff with Bipolar I  
16 Disorder, Posttraumatic Stress Disorder, Persistent Depressive Disorder, Panic  
17 Disorder and Alcohol Use Disorder. AR 711. Dr. Tapper concluded that plaintiff's  
18 prognosis was guarded but fair and plaintiff appeared to be capable of managing his  
19 own funds. AR 712.

20 Ultimately, Dr. Tapper opined that plaintiff "does not appear to be capable of  
21 working in any capacity. He has a long history of attempting to work but not being able  
22 to function because of his mood cycling. He has had repeated decompensation where  
23 he is unable to perform consistently in any activity and he is very sensitive to stress. He

1 experiences paranoia and panic attacks and is not able to function in any work  
2 environment around other people." AR 712.

3 The ALJ rejected Dr. Tapper's opinion. AR 22. First, the ALJ found that Dr.  
4 Tapper's opinion that plaintiff was not capable of working because of a history of  
5 attempting to work but failing because of mood cycling and repeated decompensation  
6 was conclusory and inconsistent with the underlying objective findings. AR 22. The ALJ  
7 reasoned that the objective findings did not demonstrate severely limiting behavior. AR  
8 22. Additionally, the ALJ stated that Dr. Tapper's note that plaintiff's prognosis was  
9 guarded to fair and that plaintiff appeared capable of managing his own funds was  
10 unaligned with Dr. Tapper's opinion. AR 22.

11 First, Dr. Tapper did not opine that plaintiff was not capable of working due to a  
12 history of attempting to work but failing because of mood cycling and repeated  
13 decompensation. AR 712. Dr. Tapper noted that plaintiff has not been able to maintain  
14 employment in the past due to mood cycling and decompensation, but opined that  
15 plaintiff experienced paranoia and panic attacks which prevent him from working in an  
16 environment around other people. AR 712.

17 Additionally, it appears that Dr. Tapper's opinion is supported by Dr. Tapper's  
18 findings. Dr. Tapper noted that plaintiff exhibited a depressed and anxious mood as well  
19 as a tense affect consistent with self-reported anxiety. AR 710. Dr. Tapper further stated  
20 that plaintiff suffered from agoraphobia, daily panic attacks, auditory and visual  
21 hallucinations, and limited concentration. AR 710-11. These findings appear to be  
22 consistent with Dr. Tapper's findings that plaintiff's mental health conditions would limit  
23 plaintiff's ability to work in an environment around other people. AR 712.

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1       Finally, it is unclear from the ALJ's decision and the record how a "guarded to  
2 fair" prognosis and plaintiff's ability to manage funds is contradictory to Dr. Tapper's  
3 evaluation and opinion.

4       Based on the foregoing discussion, the ALJ's rejection of Dr. Tapper's opinion is  
5 unsupported by substantial evidence.

6           3. Edward Beaty Ph.D.

7       In 2019, Dr. Beaty provided a Mental Residual Functional Capacity Assessment.  
8 AR 110-11. Dr. Beaty opined that plaintiff was markedly limited in the following areas:  
9 ability to maintain attention and concentration for extended periods; ability to perform  
10 activities within a schedule, maintain regular attendance, and be punctual within  
11 customary tolerance; and ability to complete a normal workday and workweek without  
12 interruptions from psychologically based symptoms and to perform at a consistent pace  
13 without unreasonable number and length of rest periods. AR 111. Dr. Beaty ended the  
14 assessment at this point stating "MRFC truncated at point of allowance." AR 111.

15       The ALJ rejected Dr. Beaty's opinion because Dr. Beaty "did not offer the rest of  
16 the assessment, making the mental residual functional capacity incomplete." AR 23.

17       Simply stating that an evaluation or assessment is incomplete is an insufficient  
18 basis to reject the opinion. The ALJ has a duty to develop the record, even when the  
19 claimant is represented by an attorney. *DeLorme v. Sullivan*, 924 F.2d 841, 847-49 (9th  
20 Cir. 1991). The ALJ's duty to develop the record is heightened where the claimant may  
21 be mentally ill and unable to protect their own interest. *Tonapetyan v. Halter*, 242 F.3d  
22 1144, 1150 (9th Cir. 2001). "Ambiguous evidence, or the ALJ's own finding that the  
23 record is inadequate to allow for proper evaluation of the evidence, triggers the ALJ's

1 duty to ‘conduct an appropriate inquiry.’” *Id.* Accordingly, the ALJ erred in discrediting  
2 Dr. Beaty’s opinion as being incomplete without further explanation.

3 Additionally, it does not appear that Dr. Beaty’s opinion is incomplete. Dr. Beaty  
4 found that plaintiff had marked limitations in functioning and expressly stated that he  
5 truncated his examination at the point of allowing the claim of disability. The fact that Dr.  
6 Beaty did not provide an evaluation of other functions after the point of allowance does  
7 not contradict or undermine the evaluation and opinion provided.

8       B. Whether this case should be remanded for an award of benefits

9       The parties agree the ALJ’s decision was not supported by substantial evidence.  
10 The Court has nevertheless analyzed the medical evidence, above, because the  
11 Commissioner contends that conflicts within the record require a remand for further  
12 administrative proceedings. Plaintiff contends that this action should be remanded for  
13 an award of benefits.

14       “The decision whether to remand a case for additional evidence, or simply to  
15 award benefits[,] is within the discretion of the court.” *Trevizo v. Berryhill*, 871 F.3d 664,  
16 682 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If  
17 an ALJ makes an error and the record is uncertain and ambiguous, the court should  
18 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045  
19 (9th Cir. 2017). Likewise, if the court concludes that additional proceedings can remedy  
20 the ALJ’s errors, it should remand the case for further consideration. *Revels*, 874 F.3d  
21 at 668.

22       The Ninth Circuit has developed a three-step analysis for determining when to  
23 remand for a direct award of benefits. Such remand is generally proper only where  
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“(1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand.”

*Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014)).

First, the Commissioner argues that the ALJ found that evidence indicated various levels of concentration, persistence, and pace which creates unanswered questions about plaintiff's residual functional capacity. Dkt. 14 (citing AR 19, 398, 474, 659, 711, 883, 940). However, the ALJ considered this conflicting evidence and concluded that plaintiff has marked limitations with regard to concentrating, persisting or maintaining pace. AR 19. Accordingly, the ALJ already considered this conflicting evidence of functioning and determined that it supported a finding of marked limitations.

Further, with regards to limitations regarding concentration, persistence and pace, the ALJ considered the opinions of Dr. Neims, Dr. Tapper and Dr. Beaty. As has been discussed in this Order, the ALJ failed to provide a reason, supported by substantial evidence, for rejecting these opinions.

These medical opinions consistently found plaintiff to be markedly limited concerning concentration, persistence and pace. Specifically, Dr. Neims opined that plaintiff's ability to communicate and perform effectively in a work setting and to complete a normal workday and workweek without interruptions from psychologically based symptoms were markedly limited. AR 446. In 2017, Dr. Neims opined again that plaintiff had marked limitations in his ability to complete a normal workday or workweek

1 without interruptions from psychologically based symptoms. AR 472. The ALJ adopted  
2 this 2017 opinion. AR 22.

3 Dr. Tapper found that plaintiff was unable to work due to depression,  
4 agoraphobia, daily panic attacks and hallucinations. AR 710-11. Finally, Dr. Beaty  
5 opined that plaintiff was markedly limited in the ability to maintain attention and  
6 concentration for extended periods of time, maintain regular attendance, and complete  
7 a normal workday or workweek without interruptions from psychologically based  
8 symptoms. AR 111.

9 During plaintiff's hearing, the vocational expert testified that if a person was  
10 consistently absent from work or consistently leaving early, the person would be  
11 precluded from employment. AR 59-60. Additionally, the vocational expert expressed  
12 that if a person exhibits extreme behavior such as panic attacks consistently, the person  
13 would also be precluded from competitive employment. AR 60. Finally, the vocational  
14 expert testified that if a person was off task for more than 10 percent of the time, they  
15 would be terminated from employment. *Id.*

16 The record has been fully developed in this case. The ALJ determined that based  
17 on plaintiff's medical records, plaintiff has marked limitations in his ability to concentrate,  
18 persist and keep pace. The medical evidence in the record is consistent with this finding  
19 and supports this finding.

20 Additionally, the medical evidence in the record consistently indicated that  
21 plaintiff would be markedly limited in his ability to complete a normal workday or  
22 workweek without interruptions from psychologically based symptoms. The testimony of  
23 the vocational expert was clear that based on these limitations, a person would not be  
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1 able to engage in competitive employment at step five of the sequential evaluation. AR  
2 60-61.

3 The criteria are met for remanding the case for an award of benefits. *Trevizo*, 871  
4 F.3d at 682-83. Additional proceedings would not serve a useful purpose.

5 CONCLUSION

6 Based on the foregoing discussion, the Court finds the ALJ erred in finding that  
7 plaintiff was not disabled. Defendant's decision to deny benefits is therefore  
8 REVERSED and this matter REMANDED for an award of benefits.

9 Dated this 17th day of November, 2021.

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13 Theresa L. Fricke  
14 United States Magistrate Judge  
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